

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

**THE HONOURABLE MR.JUSTICE P.N.RAVINDRAN
&
THE HONOURABLE MR. JUSTICE ANIL K.NARENDRAN**

WEDNESDAY, THE 20TH DAY OF MAY 2015/30TH VAISAKHA, 1937

RFA.No. 700 of 2008

O.S.NO.57 OF 2006 OF PRINCIPAL SUB COURT, ERNAKULAM

APPELLANT(S)/PLAINTIFF :

**ASOKAN.K.P., S/O.PARAMESWARAN,
KOCHUPURACKAL, EROOR DESOM, NADAMA VILLAGE,
KANAYANNUR TALUK, ERNAKULAM DISTRICT.**

BY ADV. SRI.M.GOPIKRISHNAN NAMBIAR

RESPONDENT(S)/DEFENDANT :

**ELIYAS, S/O.THOMAS,
NEDUVATHULLIYIL THUNDIYIL, KANDANADU DESOM,
MANKUNNAM VILLAGE, KANAYANNUR TALUK, ERNAKULAM DISTRICT.**

**BY ADVS. SRI.M.P.RAMNATH
SRI.P.RAJESH (KOTTAKKAL)
SMT.S.SANDHYA
SMT.UMA R.KAMATH**

**THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD
ON 24-02-2015, THE COURT ON 20-05-2015 DELIVERED THE
FOLLOWING:**

Msd.

P.N.RAVINDRAN & ANIL K.NARENDRAN, JJ.

R.F.A.No.700 of 2008

Dated this the 20th day of May, 2015

JUDGMENT

Anil K.Narendran, J.

The appellant is the plaintiff in O.S.No.57 of 2006 on the file of the Court of the Principal Subordinate Judge of Ernakulam. The said suit was filed for specific performance of Ext.A1 sale agreement dated 20.7.2005 executed between the appellant and the respondent herein in respect of the plaint schedule property or in the alternative for return of the advance sale consideration of ₹2,00,000/- together with interest at the rate of 12% per annum. The court below held that the appellant/plaintiff failed to perform his part of the agreement and the contract failed because of that and therefore, he is not entitled to get a decree for specific performance, as prayed for. But, the court below decreed the suit in part holding that, the appellant/plaintiff is entitled to get back the advance sale consideration. In the result, the court below passed a decree to the effect that the appellant/plaintiff is entitled to get ₹2,00,000/- with interest at the rate of 12% from the date of suit till the date of

realisation together with proportionate costs from the respondent/defendant and that the said amount will be a charge on the plaint schedule property. Aggrieved by the judgment and decree of the court below declining the relief of specific performance of contract, the appellant/plaintiff is before us in this appeal.

2. Going by the averments in the plaint, the plaint schedule property having an extent of 40 cents situate in R.S.No.154/20 in Block No.19 of Manakunnam Village in Kanayannur Taluk, with a building situated therein, belongs to the respondent/defendant. On 20.7.2005, the parties had entered into Ext.A1 agreement for sale of the plaint schedule property to the appellant/plaintiff for a total consideration of ₹7,00,000/-, out of which an amount of ₹2,00,000/- was paid to the respondent/defendant as advance, on the very same date. The period for execution of sale deed was fixed as six months from the date of the agreement and the respondent/defendant had agreed to clear all the liabilities over the plaint schedule property to the bank and also to measure out the said property at his expense and to satisfy the appellant/plaintiff about the extent of the property. According to the appellant/plaintiff, he was always ready and willing to perform his part of the contract by paying the balance sale consideration. But the respondent/defendant failed to fulfil the

terms and conditions of the contract. On 17.1.2006, the appellant/plaintiff went to the house of the respondent/defendant and requested him to execute the sale deed. But he refused to do so and told him that he has arranged the sale of the plaint schedule property at a higher consideration of ₹9,00,000/- to a stranger. Therefore, according to the appellant/plaintiff, Ext.A1 sale agreement could not be performed due to the failure of the defendant to perform his part of the contract. So, the plaintiff prayed for specific performance of Ext.A1 sale agreement dated 20.7.2006, with an alternative prayer for return of the money advanced together with 12% interest.

3. The respondent/defendant filed a written statement admitting the execution of Ext.A1 sale agreement and also the receipt of ₹2,00,000/- as advance sale consideration from the appellant/plaintiff. In Ext.A1 sale agreement a period of six months was prescribed for completing the sale and that on 21.7.2005 itself, he cleared all the liabilities over the plaint schedule property and obtained a release deed from the Service Co-operative Bank. The measurement of the plaint schedule property was also done as agreed to by both parties. He had not obtained the encumbrance certificate of the plaint schedule property as the appellant/plaintiff

had agreed to take the same. He had also handed over all necessary documents for preparation of sale deed. Therefore, according to the respondent/ defendant, he had fulfilled all the conditions in Ext.A1 sale agreement and was ready and willing to execute the sale deed. He had in fact issued Ext.B5 letter dated 23.12.2005 to the appellant/plaintiff showing his willingness to execute the sale deed within the stipulated period, but, the appellant/plaintiff neither intimated his willingness to pay the balance sale consideration nor approached him for completing the sale. Later, the appellant/plaintiff sought extension of time by three months through a broker for giving the balance sale consideration, but the respondent/ defendant was not ready for the same, as he had entered into an agreement with one Narayanan for the purchase of a house and five cents of property and paid an advance sale consideration of ₹50,000/-. The respondent/defendant contended that the sale deed could not be executed because of the laches on the part of the appellant/plaintiff and therefore, the prayer for specific performance cannot be granted. The respondent/ defendant contended further that, he has sustained loss in the transaction with the appellant/plaintiff and that loss has to be made good by the appellant/plaintiff.

4. On the side of the appellant/plaintiff, he was examined as PW1 and the agreement for sale was marked as Ext.A1. On the side of the defendant, he was examined as DW1 and Exts.B1 to B6 were marked.

5. On an appreciation of the facts of the case and the evidence on record, the court below came to the conclusion that the appellant/plaintiff failed to perform his part of the agreement and the contract failed because of that. So the appellant/plaintiff is not at all entitled for a decree for specific performance, as prayed for. Regarding the alternate prayer for return of advance money, the court below held that, in the absence of any evidence adduced by the respondent/defendant to substantiate the fact that he had sustained any loss, the appellant/plaintiff is entitled to get back the advance amount together with 12% interest from the date of suit till the date of realisation with proportionate costs from the defendant. The court below has also ordered that the aforesaid amount will be a charge on the plaint schedule property.

6. We heard the arguments of the learned counsel for the appellant/plaintiff and also the learned counsel for appearing for the respondent/defendant.

7. The sole issue that arises for consideration in this appeal

is as to whether, in the facts and circumstances of the case and on the evidence on record, the court below was justified in declining the relief of specific performance of Ext.A1 sale agreement.

8. As we have already noticed, in the written statement, the respondent/defendant had admitted the execution of Ext.A1 sale agreement and also the receipt of the sum of ₹2,00,000/- from the appellant/plaintiff towards advance sale consideration. The contention raised by the appellant/plaintiff is that he was always ready and willing to perform his part of the contract and that the contract could not be performed due to the failure on the part of the respondent/defendant in performing his part of the contract. Per contra, the respondent/defendant would contend that he was always ready and willing to perform his part of the contract and that only because of the laches on the part of the appellant/plaintiff the sale deed could not be executed.

9. The plaintiff who was examined as PW1 has deposed that he is a milkman getting a monthly income of ₹5,000/-. PW1 has admitted that on 20.7.2005, the plaint schedule property was measured and the boundaries were fixed and that it was on that basis, Ext.A1 sale agreement was prepared. PW1 has also admitted that the respondent/defendant has disclosed the liability over the

plaint schedule property and that immediately after payment of the advance amount, the respondent/defendant has cleared the liability towards the bank and the said fact was also intimated to him. But according to PW1, he was not given the original of the release deed obtained by the respondent/defendant from the bank. But PW1 has admitted that, for preparation of the sale deed, a copy of the title deed and encumbrance certificate alone are sufficient and he has also deposed that the encumbrance certificate can be obtained either by himself or by the respondent/defendant on application.

10. According to PW1, he was intending to take a loan for purchasing the plaint schedule property. But, PW1 has not chosen to produce any documents in this regard. Though PW1 has stated that he has sold some of his properties for an amount of ₹7,00,000/-, he has admitted that the said amount was never deposited in any bank and that he had invested the same in his business. PW1 has also stated that he has not issued any notice to the respondent/defendant demanding execution of a sale deed in terms of Ext.A1 sale agreement.

11. On the other hand, the defendant, who was examined as DW1 has deposed that he has fulfilled all the terms of Ext.A1 sale agreement and that he was ready and willing to execute the sale

deed. Ext.B1 receipt dated 21.7.2005 and Ext.B2 challan dated 21.7.2005 would show that the respondent/defendant had cleared all the liabilities to the bank and obtained Ext.B3 release deed. DW1 has also sent Ext.A5 letter to the appellant/plaintiff intimating his readiness to perform his part of the contract. Therefore, the evidence on record clearly indicates that the appellant/plaintiff has not taken any steps to complete the sale in terms of Ext.A1 sale agreement. On the other hand, the respondent/defendant has performed his part of the contract and has even cleared the liabilities over the plaint schedule property and obtained a release deed and also got the property measured to the satisfaction of the appellant/plaintiff. It has also come out in evidence that a copy of the title deed of the plaint schedule property, a copy of the release deed obtained from the Co-operative Bank, etc., were handed over to the appellant/plaintiff for preparation of the sale deed.

12. Even though the appellant/plaintiff would contend that, he was ready and willing to pay the balance sale consideration, it has come out in evidence that PW1 was not having sufficient funds for payment of the balance sale consideration. Though PW1 has deposed that he was intending to take a loan from the bank for purchasing the plaint schedule property, he has admitted during

cross-examination that he has not even filed an application for a loan. Even though PW1 has deposed that he had sold some property for ₹7,00,000/-, there is absolutely no evidence to show that the said amount was available with him. PW1 has also admitted that the aforesaid amount of ₹7,00,000/- was never deposited in any bank and that he had invested the said amount in his business. Therefore, there is absolutely no evidence to show that the appellant/plaintiff was having sufficient funds for payment of the balance sale consideration in terms of Ext.A1 sale agreement or that he was capable of raising the said amount at that point of time.

13. Even though the appellant/plaintiff would contend that he had approached the respondent/defendant many times for executing the sale deed, there is absolutely no material to substantiate the aforesaid contention. Further, PW1 has admitted that he has not issued any notice to the respondent/defendant intimating his readiness and willingness to pay the balance sale consideration and demanding the respondent/defendant to execute the sale deed in terms of Ext.A1 sale agreement. In the absence of any reliable materials on record, the court below rightly concluded that the appellant/plaintiff was not ready and willing to perform his part of the contract and it is only because of that, the contract failed.

14. The finding of the court below in the impugned judgment that the appellant/plaintiff is not entitled for a decree of specific performance of the contract is neither perverse nor patently illegal so as to make out a case for interference with the judgment of the court below. We also notice that, the respondent/defendant has deposited the decree debt of ₹2,60,000/- before the court below vide challan dated 23.9.2008 and a memo to that effect dated 14.10.2008 was also filed before the court below.

In the result, the appeal fails and is dismissed. The parties shall bear their respective costs.

Sd/-

P.N.RAVINDRAN, JUDGE

Sd/-

ANIL K.NARENDRA, JUDGE

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